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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 241

LIEBMANN BREWERIES, INC., a corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF LOS ANGELES; UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION,

Respondents.

Reply to Respondents' Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

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Comes Now the Petitioner, Liebmann Breweries, Inc., replying to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari, and respectfully submits:

Introduction.

The Petition for Certiorari here has been made to review the final decision of the highest state court in which a decision could be had, the District Court of Appeal, Second Appellate District, State of California,

which, in an original proceeding on a Petition for Writ of Mandate, denied the Petition, and certified that it was material to the determination of the case to decide an important federal question presented to it and decided by it. The only facts and documents which may be considered on this Petition are those contained in the record of the District Court of Appeal.

Respondents have utterly ignored this record and have instead, in violation of the Rules of the Supreme Court, discussed at great length in their Brief, proceedings, depositions and affidavits in the Superior Court of the State of California, which were undeniably not considered by the District Court of Appeal, and which undeniably are not, therefore, a part of the record here. In their determined attempt to prevent this Honorable Court from considering the important constitutional question presented by the record in the District Court of Appeal, Respondents have not hesitated to print in their entirety two affidavits and a Superior Court minute order which were never considered by the District Court of Appeal. These improperly-offered documents were appended to Respondents' Brief, which was predicated entirely thereon.

ARGUMENT.

I.

The Honorable Supreme Court Should Consider Only the Complete Record of the District Court of Appeal and Based Thereon Should Grant the Petition for Certiorari Which Seeks Review of the Final Judgment of the Highest State Court, Having Certified That It Was Material to Its Determination to Decide an Important Federal Question Based Only on the Record Before It.

The District Court of Appeal decided the important federal question presented to it on the verified Petition for Writ of Mandate only on the record before it. The records, files, documents and proceedings in the Superior Court were not transmitted to the District Court of Appeal either by Respondents or pursuant to an Order of Court. Thus they did not become a part of the record. (Cal. Rules on Appeal, Rule 12(a).) Respondents did not file an Answer to the verified Petition for Writ of Mandate. (Cal. Code Civ. Proc., Secs. 1089, 1090.) The District Court of Appeal had no way to consider the matters Respondents now raise. (Cal. Code Civ. Proc., Sec. 1094.) Under California Statutes and Rules of Court a Petition for Writ of Mandate must be verified and must be accompanied by Points and Authorities, but it is not accompanied by a complete transcript of the tribunal to which the Mandate is directed. (Cal. Rules on Appeal, Rule 56; Cal. Code Civ. Proc., Sec. 1086.)

If Respondents had felt there was any merit in the additional matters they raise here, they could have chal-

lenged the legal sufficiency of the Petition for Writ of Mandate, or they could have raised questions of fact, either by a Demurrer or an Answer. (*Swars v. Council of the City of Vallejo,* 64 Cal. App. 2d 858, 149 P. 2d 397 (1944).) Since no answer was interposed, the truth of all the facts in the Petition was conceded (*Western States Construction Co. v. Municipal Court of the City and County of San Francisco,* 38 Cal. 2d 146, 238 P. 2d 562 (1952)), and the failure to file a Demurrer waived any defect in the sufficiency of the Petition. (*Goldman v. Superior Court,* 124 Cal. App. 2d 165, 166, 268 P. 2d 134 (1954).) Although the District Court of Appeal could, under its Rules of Court, have requested or considered other matters, it chose not to do so and, therefore, rendered its decision and certified the existence of the federal question only on the record before it. (Cal. Code Civ. Proc., Sec. 1094.)

Any matters not a part of the record considered by the District Court of Appeal should not be considered by the Honorable Supreme Court. (Revised Rules of the Supreme Court of the United States, Rule 21(1).)

The Honorable Supreme Court should strike such documents and proceedings which are not in the record of the District Court of Appeal. (*McClellan v. Carland,* 217 U. S. 268 (1910).) Since Respondents' Brief relates to documents which are not a part of the record from the Court whose decision is sought to be reviewed, the Honorable Supreme Court should, on motion, strike not only such documents, but that portion of the brief relating thereto. (*Lawn v. United States,* 355 U. S. 339 at 354 (1958).) Petitioner has made a Motion to Strike and Expunge the documents and Brief which Respondents improperly seek to present.

II.

The Honorable Supreme Court Should Disregard and Reject Respondents'. Improper Argument That Petitioner Has Made a General Appearance Because This Was Not Raised Before or Considered by the District Court of Appeal and Because Respondents' Argument Is Factually and Legally Erroneous.

The argument that Petitioner has made a general appearance is totally unwarranted. None of the Superior Court procedural matters on the admissibility of evidence were presented to or considered by the District Court of Appeal in deciding the case before it. On the authority cited above, this Honorable Court should disregard Respondents' argument since the District Court of Appeal's decision was not based on that ground, as the Certificate of Existence of Federal Question conclusively proves.

On the facts and law Respondents' argument is wrong. The truth of the matter is that Petitioner responded to the invitation of the Honorable Superior Court in assisting its consideration of the competency and relevancy of the documents submitted to it by Respondents.

As a matter of California law, Petitioner did not make a general appearance. This Petitioner did not intentionally come into the jurisdiction of the Court for the purpose of appealing any ruling or order going to the merits of the case. (*Dickson v. Parker*, 59 Cal. App. 778, 212 Pac. 42 (1922); *Davenport v. Superior Court*, 183 Cal. 506, 191 Pac. 911 (1920); *Powers v. Braly*, 75 Cal. 237, 17 Pac. 187 (1888).) Under California law an appearance is not general where a foreign corporation challenging the jurisdiction of the California Court par-

ticipates in the determination of questions of fact (*Braden Copper Co. v. Industrial Accident Commission,* 147 Cal. App. 2d 205, 209, 305 P. 2d 222 (1956)), or matters of law. (*Armstrong v. Superior Court,* 146 Cal. App. 2d 420, 423, 301 P. 2d 51 (1956).)

Logic and reason support the rule that a defendant challenging the jurisdiction of a court does not submit to jurisdiction when it establishes facts to prove the validity of service of process (*Garvey v. Compania Metalurgica Mexicana,* 222 Fed. 732 (W. D. Tex., 1915); *Abel v. Smith,* 151 Va. 568, 144 S. E. 616 (1928)), or when it applies for relief from improper discovery procedures. (*Bitter v. Gold Creek Mining Co.,* 225 Wis. 55, 273 N. W. 509 (1937).)

III.

The Honorable Supreme Court Should Disregard and Reject Respondents' Improper Argument That Petitioner Carried on Activities in California Sufficient for the California Courts to Assert Jurisdiction Over It Because Respondents' Argument Is Based on Matters Which Were Not Raised Before or Considered by the District Court of Appeal, and Because Respondents' Erroneous Argument Is Not Supported by the Facts or on the Law.

Because the additional matters raised by Respondents do not appear in the record of the District Court of Appeal, Respondents should not base their arguments upon them before the Honorable Supreme Court. For the reasons and on the authorities cited above these documents should not be considered by this Honorable Court.

The bases upon which Respondents made their argument are inaccurately deduced from these documents. A

correct statement of the facts revealed by these additional documents is as follows:

1. Philip Liebmann, who was President of Petitioner and its subsidiary, Rheingold Brewing Co., carried on negotiations with certain Respondents in the State of California for the use by Rheingold only of advertising material in California.

2. During the time Rheingold was actively carrying on business, Petitioner and its subsidiary, Rheingold Brewing Co., had entered into and were acting under and pursuant to written agreements for the licensing of trademarks and beer formulas, which actions ceased prior to the commencement of the Superior Court lawsuit by Respondents.

These facts emphasize that Respondents are relying upon the parent-subsidiary relationship to support the assertion of jurisdiction. But Petitioner kept a separate and distinct relationship between itself and its subsidiary pursuant to the rule of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U. S. 333 (1925), which has been consistently followed by the Courts to the present time. A departure therefrom in this case below affronts the established rule and the concept of fairness underlying due process of law.

When Philip Liebmann negotiated in California with regard to the advertising of beer for Rheingold Brewing Co. in the State of California, his activities were conspicuously those of the President of Rheingold Brewing Co. only. He could not have been acting for or on behalf of Petitioner. Petitioner had no license to manufacture, sell or advertise the sale of beer in California. (Cal. Bus. and Prof. Code, Secs. 23356, 23357, 23374.) It did not

do so. If it had done so, it would have been guilty of a misdemeanor (Cal. Bus. and Prof. Code, Secs. 23300, 23301) and California statutes specifically provide that a person is presumed to be innocent of any crime. (Cal. Code Civ. Proc., Sec. 1963.1; *Alford v. Bello*, 130 Cal. App. 2d 291, 278 P. 2d 962 (1955).)

The rule of *Cannon v. Cudahy* supports the conclusion that the conduct of Philip Liebmann establishes the existence of a parent-subsidiary relationship, which will not afford a basis for California courts to assert jurisdiction over the Petitioner. The fact that there may have been officers in common or interlocking directors between the parent and its subsidiary does not have the consequence of giving jurisdiction over the parent to the courts of the forum in which the subsidiary does business. (*Selbert v. Lancaster Chocolate & Caramel Co.*, 23 F. 2d 233 (C. C. A. 6, 1928); see, also, *Berkman v. Ann Lewis Shops, Inc.*, 246 F. 2d 44 (C. A. 2, 1957); *Shedd v. Willys Motors Inc.*, 143 Fed. Supp. 391 (S. D. N. Y., 1956).)

The existence of a license agreement between Petitioner and its subsidiary proves that Petitioner did not intend to nor did it establish any contacts with California so as to submit itself to California jurisdiction. Had Petitioner desired to do business and carry on its activities in California, it would have done so. Instead, it chose not to do so, and licensed its trademarks and formula for the use of its subsidiary. It was the subsidiary which carried on the subsidiary's business and activities in California. This does not supply the constitutional contacts necessary to satisfy the due process requirements. (*Bergholt v. Hudson Motor Car Co.*;

124 Fed. Supp. 716 (D. Minn., 1954); *Hudson Minneapolis, Inc. v. Hudson Motor Car Co.*, 124 Fed. Supp. 720 (D. Minn., 1954).)

Petitioner's license agreement was an incident to its ownership of a majority of the stock of a corporation which owned the stock of Rheingold. The control of the subsidiary is not a submission to jurisdiction. (*Harris v. Deere & Co.*, 233 F. 2d 161 (C. A. 4, 1955); *Dam v. General Electric Co.*, 111 Fed. Supp. 342 (D. Wash., 1953); *Gravely Motor Plow & Cultivator Co. v. H. V. Carter Co.*, 193 F. 2d 158 (C. A. 9, 1951).)

Respondents do not contend, nor can they contend, that Petitioner sells any of its products in California or carried on any business activity in the State of California in connection with its business of manufacturing and the sale of beer. It did not even have sporadic activities in California. (*LeVecke v. Griesedieck Western Brewery Co.*, 233 F. 2d 772 (C. A. 9, 1956).)

The activities which Respondents point to are not those of Petitioner but of its subsidiary, Rheingold.

The alleged contracts which are the basis for Respondents' cause of action could not have applied to Petitioner. The license to use Respondent's advertising character in the State of California and the State of Arizona could only apply to Rheingold Brewing Co. It could not apply to Petitioner either by the terms of the contracts or by any fair or just construction thereof. Petitioner did not have the right to, and did not, manufacture, sell or advertise the sale of beer in the State of California. The contracts were and are completely meaningless to Petitioner's business. The drafts of admittedly unexecuted proposals prove that Respondents knew Petitioner did not do busi-

ness in California and that Respondents only contracted with the subsidiary which did business in California. [See Affidavit of Walter H. Liebman, "Ex. F" to the Petition for Writ of Mandate.] Those drafts could not be the basis for asserting jurisdiction over Petitioner.

The jurisdictional problems raised by the Fourteenth Amendment should be resolved by considering the fairness to the parties involved. Here there are no acts by the Petitioner in California to establish that it enjoyed the protection of California law. It did not contract with California residents. It did not deal in Califorina in matters of special regulatory significance to the State of California. As the depositions themselves prove, the witnesses and testimony as respects Petitioner are not in California, but in New York.

The record also discloses that some of the Respondents had offices in New York, so that there would be little burden for them to litigate against Petitioner in that forum, not in California where they never dealt with Petitioner. Because of the patent unfairness to Petitioner, the jurisdictional problem should be resolved in its favor.

McGee v. International Life Insurance Co., 355 U. S. 220 (1957), is distinguishable from the facts here because it involved a special situation concerning California residents where the evidence was found in California, and was based on a special regulatory provision of the California Insurance Code. Under those particular circumstances, due process was satisfied for that situation. The decision of *McGee* has not given unlimited authority to State Courts to assert jurisdiction over foreign corporations. (*Hanson v. Denckla*, 357 U. S. 235 (1958).)

Respondents misconceive the applicability here of *Chipman Ltd. v. Jeffrey Co.*, 251 U. S. 373 (1920), and

Consolidated Textile Corp. v. Gregory, 289 U. S. 85 (1933). Philip Liebmann negotiated for Rheingold the subsidiary and not for the Petitioner unlike the corporate president in *Consolidated* who acted for the foreign parent corporation. Moreover, *Consolidated's* subsidiary had, unlike Petitioner's, sold the parent's products in the forum. But the acts of the subsidiaries are not relevant in determining the question of jurisdiction.

In *Chipman*, the foreign corporation had removed from the forum before the service of Summons. That is the essential time for jurisdictional purposes. There is no basis whatsoever to indicate the Petitioner had any contacts with California at that time.

Petitioner did not engage in economic or any activity in California. But Respondents, by offering improper documents attempt to becloud the issue and confuse the jurisdictional facts. In essence Petitioner's only activity was carrying on a relationship with its subsidiary which historically has not, as a matter of law, supported the assertion of jurisdiction over foreign parent corporations. It would be an unfair and unconstitutional burden upon Petitioner to have to submit to the jurisdiction of California courts in this situation.

The Honorable Supreme Court should grant the Petition for Certiorari to prevent the unconstitutional acts of state courts contrary to the long-accepted understanding and expectancy of the business community.

Conclusion.

The proper record before this Honorable Supreme Court is clear and uncontradicted. It is based upon the record which was actually before the District Court of Appeal and which the District Court of Appeal con-

sidered in denying the Petition and in certifying the existence of a Federal Question. Respondents sought to have the Certificate of the Existence of the Federal Question amended. They obtained an insignificant modification from the District Court of Appeal, which in no way changes the clear determination by that Court of the fact that it decided the original proceedings before it based upon Petitioner's contention of the Federal question posed by Petitioner. Respondents now seek to confuse the issue before this Court by offering additional documents which were not in the record before the District Court of Appeal whose decision is sought to be reviewed by this Court. They improperly suggest that the decision below is not final, knowing full well that their authority is no longer applicable because of the subsequent enactment of California Code of Civil Procedure, Section 416.3. (Cal. Stats. 1955, Chap. 1452, Sec. 3.) An accurate statement of the facts supports Petitioner's argument and Respondents' additional documents have no effect other than to cloud the issue herein. The Honorable Supreme Court now has an opportunity to consider the issues clearly posed by the proper record of the District Court of Appeal before it on a subject of present national importance to the business community and the bar, and should, therefore, grant the Petition for Writ of Certiorari.

Respectfully submitted,

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